

The Secretary
Senate Legal and Constitutional References Committee
Parliament House
Canberra ACT 2600

Att: Mr Peter Hallahan

4 November 2002

Dear Sir\Madam,

**Submission to Inquiry Into *ASIO Legislation Amendment (Terrorism) Bill 2002 (Cth)* by
Senate Legal and Constitutional References Committee**

Thank you for your e-mail of 22 October 2002 inviting a submission to the inquiry by the Senate Legal and Constitutional References Committee into the *ASIO Legislation Amendment (Terrorism) Bill 2002 (Cth)*. My submission is set out below.

A. INTRODUCTION

This submission concentrates upon the following terms of reference for the inquiry:

- . The development of an alternative regime for questioning to obtain intelligence relating to terrorism
- . Recent overseas legislation dealing with the investigation of potential terrorist activities or offences
- . Whether the bill in its current or amended form is constitutionally sound
- . The implications for civil and political rights of the bill

Whilst the report of the Joint Parliamentary Committee on the *ASIO Legislation Amendment (Terrorism) Bill 2002 (Cth)* proposed a number of sensible amendments to the bill, the intense time constraints for the inquiry and the lack of senior legal counsel appointed to assist the Committee meant that the Committee's recommendations failed to address three critical issues: Firstly, the unacceptability of incommunicado detention of non-suspect citizens as a method of collecting intelligence. Secondly, real doubts about the constitutionality of executive detention. Thirdly, the availability of effective, non-detention alternatives already enacted in other jurisdictions such as Canada and the United Kingdom that are adaptable to Australian circumstances.

B. INCOMMUNICADO DETENTION UNDER THE BILL: BREACHES OF INTERNATIONAL CIVIL AND POLITICAL RIGHTS

. Incommunicado detention: an overview of the bill

A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention.¹

The first issue is the unacceptability in a democratic society of incommunicado detention of persons not suspected of offences and the real risk of substantial abuses of human rights such detention creates.

The fact that post September 11, comparable democracies such as the United States, the United Kingdom, Canada and New Zealand have not legislated for incommunicado detention of non suspect citizens, highlights the anomalous and draconian nature of the Australian bill.

It is important to remember that persons detained and interrogated under an amended version of the bill, potentially including journalists, religious and ethnic leaders, commentators and politicians, friends and neighbours, will still have fewer rights than those arrested for, and charged with, actual terrorist offences under the *Commonwealth Criminal Code*.

Those arrested in connection with a terrorist offence would be subject to the arrest, forensic and investigatory protections of Parts 1AA, 1C and 1D of the *Commonwealth Crimes Act*. Under the *Commonwealth Crimes Act* arrest provisions, reasonable grounds must exist that the person has committed or is committing an offence against a law of the Commonwealth.

It would still be the case with the amended version of the bill that a person detained would effectively disappear for up to 168 hours (1 week). There is no right for the detainee to notify a friend, relative or other interested person of their whereabouts after a set period of detention. There is no right of legal representation of a detainee during the first 48 hours of detention.

. Incommunicado detention and other issues: breaches of the *International Covenant on Civil and Political Rights*

Various clauses of the amended bill continue to breach several of the provisions of the *International Covenant of Civil and Political Rights*.

Australia has ratified the ICCPR and acceded to the Optional Protocol to the ICCPR, allowing individual communications alleging ICCPR breaches to be made to the UN Human Rights Committee in Geneva.

¹ S.34 F (8).

. ICCPR: Art 7: (prohibition against torture and cruel, inhuman or degrading treatment or punishment):

Key requirements of UN Human Rights Committee General Comment 20 on Art 7:

. Text of Art 7 allows no limitation, no derogation from provisions of Art 7 allowed, even in situations of public emergency such as those referred to in Art 4 of ICCPR

. Prohibition extends to acts that cause mental suffering to the victim

. Not sufficient for implementation of Art 7 to prohibit such treatment or to make it a crime. States Parties to ICCPR are required to inform the HRC of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction

. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training

. To guarantee effective protection of detained persons, provisions should be made for detainees to be held in places officially recognised as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned

. Incommunicado detention is specifically prohibited under Art 7:

“Provisions should also be made against incommunicado detention...The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members

Accordingly, **the bill breaches Art 7 by:**

. Instituting *per se* a system of incommunicado detention

. Doing little more than including a general prohibition against cruel, inhumane or degrading treatment or punishment, with an offence for knowingly contravening the general prohibition ie a lack of sufficient safeguards

. Denying access to an approved lawyer for the first 48 hours

. Making no provision for access to doctors

. Denying access under appropriate supervision to family members

. Not establishing officially recognised places of detention

. Not establishing registers recording appropriate details of detention

. Not establishing effective *immediate* mechanisms for intervention by the Inspector-General of Intelligence and Security and the Ombudsman upon complaint by the detainee of improper treatment

ICCPR : Art 10: (positive requirement that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person)

Key requirements of UN Human Rights Committee General Comment 21 on Art 10:

. Persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.

. Respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons

. Persons deprived of liberty enjoy all the rights set forth in the ICCPR, subject to the restrictions that are unavoidable in a closed environment

Therefore, as Art 10, paragraph 1 imposes a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, the positive requirements complement the prohibitions in Art 7.

The bill arguably breaches Art 10 by not specifying any provisions for fulfilment of the positive obligations of Art 10, other than including a requirement that the person be treated with humanity and respect for human dignity with an offence for knowingly contravening the general prohibition

ICCPR: Art 9

Key requirements of UN Human Rights Committee General Comment 8 on Art 9:

Where preventive detention is used, for reasons of public security, it must be controlled by these same provisions ie it must not be arbitrary, must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available as well as compensation in case of a breach

ICCPR: Art 9 (1): (applicable in all deprivations of liberty): Arrest or detention must not be “arbitrary”

Meaning of “arbitrary” has been found to include elements such as inappropriateness, injustice and unpredictability: *Van Alphen v Netherlands* Communication 305/1988 and disproportionality in the circumstances: *A v Australia* Communication 560/1993

The capacity for detention without criminal charge potentially violates Art 9(1) where it is not reasonable in all the circumstances: *Van Alphen v Netherlands* Communication 305/1988

The bill may breach the Art 9(1) prohibition against arbitrariness as the grounds for obtaining a warrant for detention “that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a

terrorism offence” are very broad, and applied in some situations, will be unreasonable and inappropriate.

ICCPR Art 9 (2) (Persons arrested shall be informed, at the time of arrest, of the reasons for arrest)

The bill breaches Art 9 (2) as it makes no explicit provision for this requirement on arrest. See 34 D (2)(b)(i) and 34 DA. The prescribed authority’s explanation similarly does not satisfy this requirement: 34E

ICCPR Art 9 (4) (a right to control by a court of the legality of the detention applies to all deprivations of liberty): “shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”

The bill arguably breaches Art 9 (4) as it withholds access to an approved lawyer for the first 48 hours and therefore frustrates or negates effective exercise of the 34E (1)(f) and 34E (3) right by the detainee to seek from a federal court a remedy relating to the detention warrant or treatment in connection with the warrant

ICCPR Art 9 (5) requires an enforceable right to compensation for a victim of unlawful arrest or detention

The bill arguably breaches Art 9 (5) as it includes no provision as to an enforceable mechanism for compensation

ICCPR Art 14 (a range of due process rights, potentially relevant in relation to the offences in 34G comprising the obligation to appear before the prescribed authority, to give information and to produce things)

ICCPR Art 14 (2) (Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law)

The strict liability aspect of the 34G(1) offence and the evidential burdens on the defendant in the 34G (3) and 34G (6) offences **may breach Article 14(2).**

ICCPR Art 14 (3)(b) (In the determination of any criminal charge against him, entitlement to minimum guarantee to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing

Incommunicado detention, with access to an approved lawyer denied for the first 48 hours, and the prohibition against consulting that approved lawyer in private, **may breach the Art 14 (3) (b) right** as so affecting the detainee’s capacity to prepare a defence

C. CONSTITUTIONALITY OF THE BILL

The Parliamentary Joint Committee did not reach a full appraisal of the complex Chapter III constitutional issues ultimately affecting the validity of the bill.

. Relevant Constitutional powers: Purposive or purposive aspect, with the application of a proportionality test.

The most likely heads of constitutional power which would support the bill are powers over Defence (s.51 vi), External Affairs (s.51 xxix) (for the implementation of international treaties), the Executive power (s.61) with the express Incidentals power (s.51 xxxix) and the implied power to protect the polity.

These powers are purposive in nature or have a purposive aspect. The purpose of the relevant law “must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth”: *Stenhouse v Coleman* (1944) 69 CLR 457. Accordingly, the relevant test developed by the High Court in characterisation as to constitutionality is to ask whether the legislation in question is reasonably capable as being considered appropriate and adapted to an identified constitutional purpose under the relevant head of power. In other words, the High Court applies a proportionality test to these powers assess the constitutionality of the relevant law.

The High Court has on occasions found that laws based on purposive powers can in fact fail this test: see *Davis v Commonwealth* (1988) 166 CLR 79 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

Some sections of the bill eg 34 F (8) “A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention” may fail the test of being reasonably capable of being considered appropriate and adapted to a relevant identified constitutional purpose.

. Chapter III *Commonwealth Constitution* immunity on constitutional power

There are constitutional doubts surrounding the administrative capacity to detain Australian citizens not involved in or suspected of a criminal offence, save in a relatively limited set of identified and exceptional circumstances.

Several judicial statements are important. In the joint judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27, 28-29 their Honours said:

It would be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why is that *putting to one side the exceptional cases to which reference is made below*, the involuntary detention of a citizen in custody by the State is *penal or punitive in character* and, under our system of government, exists

only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt....

There are some qualifications which must be made to the general proposition that the power to order a citizen be involuntarily confined in custody is, under the doctrine of separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts. [The exceptional cases of permissible involuntary detention then listed are]:

- . Committal to custody awaiting trial
- . Mental illness
- . Infectious disease
- . Traditional powers of the Parliament to punish for contempt
- . Military tribunals to punish for breach of military discipline
- . [and in *Lim* itself, the Court was concerned with provisions of the *Migration Act 1958* (Cth) which authorised the detention of non-citizens for a specified period for the purposes of expulsion or deportation. The validity of those provisions as an exercise of the constitutional power conferred in relation to aliens by s.51 (xix) of the Commonwealth Constitution was upheld by the Court] (emphasis added)

Their Honours then observed:

Otherwise...the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth. [Their Honours stated it was unnecessary to consider whether the defence power in times of war will support an executive power to make detention orders such as that considered in *Little v Commonwealth* (1947) 75 CLR 94]

According to Gummow J in *Kruger v Commonwealth* (1997) 190 CLR 1, 161-162

A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth.

The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends on whether those activities are reasonably capable of being seen as *necessary* for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed (emphasis added)

This test adopted by Gummow J is not necessarily identical to that formulated by the other justices in *Lim*:

“reasonably capable of being seen as necessary”: Brennan, Deane and Dawson JJ at 33

“does not exceed what is reasonably necessary”: Gaudron J at 58

“reasonably necessary”: McHugh J at 65, 71

However, in *Lim*, McHugh J noted (1992) 176 CLR 1, 71:

Although detention under a law of the Parliament is ordinarily characterised as punitive in character, it cannot be so characterised if the purpose of the imprisonment is to achieve some legitimate non-punitive object...But *if imprisonment goes beyond what is reasonably necessary* to achieve the non-punitive object, it will be regarded as punitive in character. (emphasis added)

Gaudron J in *Kruger* considered that a general immunity from involuntary detention did not derive from Chapter III, but that a broad immunity similar to, but not precisely identical with that identified by Brennan, Deane and Dawson JJ in *Lim*, arose from and applied to constitutional powers under s.51 of the *Commonwealth Constitution*. Gaudron J stated:

I am of the view that the true constitutional position is that, subject to certain exceptions, a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s.51 confers legislative power. If, as I think, the legislative power conferred by s.51 of the Constitution does not extend to authorise laws conferring a power of detention divorced from criminal guilt, unless they are laws with respect to the topics or perhaps some of the topics to which reference has been made...(1997) 190 CLR 1, 110-111.

. The argument as to Chapter III constitutional invalidity

The character of a law is derived from its terms ie its text of the law and also from the operation and effect of the law: *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1.

It is an arguable constitutional point that applying the test derived from the above Chapter III cases, the detention authorised under the *ASIO Legislation Amendment (Terrorism) Bill 2002* (Cth) is not reasonably capable of being seen as necessary for a legitimate non punitive or non penal objective, and is therefore unconstitutional as infringing Chapter III.

This conclusion is supported by the following factors:

- . The preventative detention aspect or practical effect of the legislation, separated from an adjudgment of criminal guilt, found explicitly in 34NA (4) (a) “it is likely that the person will commit, is committing or has committed a terrorism offence” Note document “Proposed Government Amendments” Recommendation 10: “...If a person has reached an age (ie 14) where they would have full criminal responsibility (and hence where the criminal law views them as capable of committing crimes and responsible for such crimes) then it is reasonable to detain and question the person in relation to a possible or potential terrorist incident”

- . The preventative detention aspect or practical effect of the legislation, separated from an accusation of crime, found expressly in 34 C (3C) (b) that “it is likely that a terrorism offence is being committed, or is about to be committed, and may have serious consequences” and found implicitly in 34C (3) (c) “may alert a person involved in a terrorism offence that the offence is

being investigated”. The latter behaviour would ordinarily constitute an offence under s.101.6 of the *Commonwealth Criminal Code*: “A person commits an offence if the person does any act in preparation for, or planning, a terrorist act”, or alternatively, such a person would be liable under the complicity and common purpose provisions (s.11.2 of the *Commonwealth Criminal Code*) as aiding, abetting, counselling or procuring the s.101.1 *Commonwealth Criminal Code* offence of “A person commits an offence if the person engages in a terrorist act”.

The preventative detention aspect of 34NA (4) (a) and 34C (3) (c) is confirmed by the use immunity provisions of 34 G (9) which makes inadmissible in evidence against the person in criminal proceedings (a) anything said by the person, while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to give information and (b) the production of a record or thing by the person, while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to produce a record or thing.

It should be recalled that in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98 the particularly focused preventative detention provisions of the NSW *Community Protection Act* were contrasted by Toohey J as “not an incident of the exclusively judicial function of adjudging and punishing criminal guilt” with what might have been acceptable as “a system of preventive detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt”

- . The availability of other schemes of collecting intelligence that is important in relation to a terrorism offence from persons not suspected of a terrorism offence (as demonstrated in the operation of the schemes in other jurisdictions such as Canada and the UK)

- . The inadequacy of the rights and protections accorded to detained persons eg 34 H (lack of an independent interpreter), 34 J (treatment with humanity and with respect for human dignity and not being subject to cruel, inhuman or degrading treatment not defined by reference to Arts 7 and 10 ICCPR General Comments 20 and 21) and 34 K (no entitlement of copy of video recordings of appearance before prescribed authority for questioning under a warrant and other matters which the prescribed authority directs to be video recorded, and in circumstances where the detainee, held incommunicado and without access to legal advice, is potentially liable for a range of offences under 34 G relating to the giving of information and producing things, carrying a penalty of five years imprisonment with evidential burdens on the detainee.)

. Referral of power from the states under s.51 (xxxvii) *Commonwealth Constitution*

On 5 April 2002, the States and Territories agreed to refer power to the Commonwealth to support federal counter-terrorism laws of national application. Whilst such a referral may remedy any existing gaps found in the Commonwealth’s defence, external affairs, executive and incidentals powers, and the implied power to protect the polity, powers referred by the states to the Commonwealth are still “subject to this Constitution” under s.51 of the *Commonwealth Constitution*.

Accordingly, the referred state legislative powers would be subject to the Chapter III implications regarding judicial power. It is of relevance that a Chapter III case, *Kable v Director of Public Prosecutions* (1996) 189 CLR 1, state preventative detention legislation enacted by the NSW Parliament under the authority of the NSW Constitution, which conferred functions on the NSW

Supreme Court, was found to be incompatible with the exercise of Chapter III federal judicial power.

D. DEVELOPING AN ALTERNATIVE MODEL

. Alternatives to incommunicado detention

The Joint Parliamentary Committee proceeded on the assumption that the present bill could be salvaged with amendments.

As a consequence, the Committee did not engage in any substantial way with alternative models for obtaining information relating to terrorism from non- suspects. In particular, the response in the United Kingdom and Canada offer important guidance for Australia.

The *ASIO Legislation Amendment (Terrorism) Bill 2002* (Cth) should be scrapped and new legislation drafted to ensure anti-terrorism measures are constitutional and adhere to the values, practices and rights of a pluralist democracy, the very things undermined by terrorism.

. Recent overseas legislation: obtaining information from persons not suspected of terrorism offences

Less draconian anti-terrorist measures have been adopted after September 11 in the United Kingdom and Canada. Instead of incommunicado detention, a model with a clear focus on actual or potential criminal activity has been followed in both jurisdictions. Reasonable suspicion is required for arrest for a variety of terrorism offences, allowing for custodial questioning of actual suspects.

Incommunicado detention of non-suspect citizens is not part of the United Kingdom or Canadian approach. The carefully calibrated legislative measures in the United Kingdom and Canada have been developed in societies with practical experience of terrorism. Britain has experienced Northern Ireland terrorism for over 30 years and in 1970, Canada experienced the major October crisis in Quebec.

United Kingdom and Canadian legislation must respectively comply with provisions of the European Convention on Human Rights and the Charter of Rights and Freedoms. Practical experience of incommunicado detention for terrorism in those countries shows that abuses and miscarriages of justice can occur.

The measures introduced in the United Kingdom and Canada provide adaptable alternatives to the Australian bill.

. Canadian legislation: *Anti-terrorism Act 2001* (Canada)

The *Anti-terrorism Act 2001* (Canada) provides for a judicially conducted non-custodial investigative hearing (along the model of a Royal Commission) for the purposes of gathering information relevant to actual or future terrorism offences.

A person may be ordered to attend the hearing to answer questions where there are reasonable grounds of belief relating to the actual or future commission of a terrorism offence, and that direct and material information relating to those offences or the whereabouts of suspected persons may be revealed through questioning that person.

In relation to the future commission of a terrorism offence, reasonable attempts must also have been made to obtain from the person concerned the information that is direct and material to the future terrorism offence.

The Canadian legislation compels attendance and remaining in attendance of the person named in the order at the investigative hearing and the production and examination of things in possession of that person at the investigative hearing. Questioning on oath of the person and production of things named in the order is done before a judge by the Attorney-General's agent.

Persons ordered to attend a hearing are obliged to answer questions put to them. There is a use immunity provision against use or receipt in criminal proceedings against that person of answers given or things produced in the investigative hearing.

The Canadian legislation contemplates arrest by warrant of non-suspects only in situations such as where they will evade service of the order to attend, are about to abscond, fail to attend or remain in attendance at a hearing.

Relevant sections of the Canadian *Anti-terrorism Act 2001* are included in the appendix to this submission.

. A suggested Australian model based on the Canadian legislation

An Australian adaptation of the Canadian legislation would need to account for limitations on constitutional power under Chapter III of the *Commonwealth Constitution*, particularly in relation to the performance of non-judicial functions by judicial officers in their personal capacity as offending the incompatibility doctrine: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

An Australian model based on the Canadian non-custodial investigative hearing could feasibly be structured around the existing provisions of the *Royal Commissions Act 1902* (Cth) by instituting a standing Royal Commission, with a series of Commissioners (with appropriate legal standing and reputation), and with provisions for suspension or adjournment of commission proceedings and for the calling of persons to give evidence and produce documents at short notice.

The provisions of the *Royal Commissions Act 1902* (Cth) in the power to summon witnesses and take evidence, the requirements of witness attendance and the production of documents, requirements to give evidence and produce documents and things and use immunity provisions for witnesses in subsequent civil and criminal proceedings are very similar to the investigative hearing provisions of the *Canadian Criminal Code*.

. United Kingdom legislation: *Terrorism Act 2000* (UK), as amended by the *Anti-Terrorism, Crime and Security Act 2001* (UK)

The *Terrorism Act 2000* (UK) as amended by the *Anti-Terrorism, Crime and Security Act 2001* (UK) has a minimum requirement for arrest of reasonable suspicion that a person is concerned in the commission, preparation or instigation of acts of terrorism.

Importantly, after September 11, separate non-terrorist, arrestable offences have also been created.

An offence exists of failing to disclose information which a person knows or believes might be of material assistance in preventing terrorist acts or in securing the apprehension, prosecution or conviction of terrorists. The onus is placed upon a person to provide that information, which they are able to do in a non-custodial situation: S.38B *Terrorism Act 2000* (UK).

An arrestable offence is also created of a person disclosing information likely to prejudice a terrorist investigation or interfere with material relevant to a terrorist investigation: s.39 *Terrorism Act 2000* (UK).

Relevant sections of the *Terrorism Act 2000* (UK) are included in the appendix to this submission.

. A suggested Australian model based on the United Kingdom legislation

. Create offences in the *Criminal Code Act 1995* (Cth) of:

- (a) non disclosure of information, without reasonable excuse, where a person actually has information which he or she knows or believes may reasonably assist in preventing an imminent terrorist attack resulting in probable loss of life or serious injury
- (b) wilful disclosure of information to persons conducting or proposing to conduct (or concerned in the commission, preparation or instigation) of an imminent terrorist attack which will prejudice the investigation of, or frustrate the obtaining of information, that is intended to prevent an imminent terrorist attack

(Modelled these offences on similar offences in s.38B and s.39 of the *Terrorism Act 2000* (UK) as amended by the *Anti-Terrorism, Crime and Security Act 2001* (UK))

. Define the key terms of the above to be quite precise about the very limited circumstances of the offence and the subsequent basis of operation of warrant, arrest and investigation powers eg:

“Imminent”= within seven days (or other appropriate period) according to a reasonable assessment of all available intelligence available from other intelligence sources;

“terrorist attack” = widespread or systematic use or threat of the use of serious force or application of serious harm in the commission of a terrorist act (as defined in s.100.1 of the Commonwealth Criminal Code)

“serious injury”= injury that is neither trivial nor temporary

. The offences are as Commonwealth offences, subject to, and integrated with, the system of protections of Parts 1AA, 1C and 1D of the Commonwealth *Crimes Act*.

. **However**, as in the present bill, ASIO should **not** have arrest powers. This is critical to distinguish it from being a political police force, to maintain a focus on genuine terrorist related matters, to ensure efficient use of resources and to maintain its reputation and integrity following the Hope Commission reforms.

. Arrest pursuant to a warrant is carried out by Federal, State or Territory police.

. It is also critical to ensure that these powers are used **only** to obtain information from persons who are **not** suspected of a terrorist offence. The present bill allows the circumvention and bypassing of the *Crimes Act* arrest, investigation and charging provisions of persons reasonably suspected of committing an offence against a law of the Commonwealth ie a terrorism offence.

. It is also critical that arrest for the non disclosure and disclosure offences have an additional check and balance **of arrest only by warrant** so as to discourage intimidation and coercion by the suggestion of criminal charges against persons merely thought to have information, and to ensure that such persons are afforded the opportunity to provide such information in a non-custodial situation.

. **Therefore**, for the offences so created of non disclosure and disclosure, **arrest should only be available by warrant:**

. Warrant issued by a Federal Court judge (ie legislation **must** specifically say that you cannot arrest for this offence without a warrant and it must make clear that **only** the police can arrest- this retains the features of the present bill)

. Affidavit for warrant presented from the Director General to the Attorney General, and then submitted for consideration by a Federal Court judge must establish:

- (a) reasonable suspicion of having committed a non disclosure or disclosure offence as per above
- (b) that other legal means have been tried to obtain the intelligence which the affidavit for a warrant now seeks in relation to the disclosure or non disclosure offences;
- (c) the information sought is reasonably believed to be of a nature or quality that will directly contribute to the prevention of an imminent terrorist attack;
- (d) that the person on whom the warrant will be served has declined a reasonable opportunity to provide the information sought in a non-custodial situation and that specific details are provided in the affidavit of the person so declining

. Person arrested is at all times in the custody of Federal State or Territory police, is questioned by Federal Police, perhaps with ASIO able to contribute to questioning

. Protections of Parts 1AA, 1C and 1D of *Crimes Act* (Cth) apply to person in custody for alleged non-disclosure or disclosure offence, with minor modifications incorporating recommendations of the Joint Parliamentary Committee on Intelligence Services *An Advisory Report on the Australian*

Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, suitably adapted to the newly created offences.

E. FURTHER ADVERSE IMPLICATIONS FOR CIVIL AND POLITICAL RIGHTS IN THE AMENDED BILL

. New and persistent problems with the amended bill

The Senate Legal and Constitutional Legislation Committee in its report on the bill advised:

In the event that the Government accepts all the PJC's recommendations, the Committee recommends that the Bill, as amended, proceed without further review by this Committee. In the event that the recommendations are not adopted, the Committee reserves the right to revisit its consideration of this Bill.

The amended bill passed by the House of Representatives on 24 September 2002 falls far short of implementing all of the Parliamentary Joint Committee's recommendations. Aside from the central issue of incommunicado detention, examined in detail in Part A of this submission, significant problems for civil and political rights persist in the amended bill.

Furthermore, the minimalist approach to incorporating some, but not all, of the Parliamentary Joint Committee's recommendations creates major new problems for civil and political rights.

An examination follows of the key offending sections of the amended bill.

. Approved lawyers: 34AA

There is no reference within this section to the fact that a list of potential approved lawyers should be those nominated by the Law Council of Australia and/or the State and Territory Law Societies.

There is no reference to the fact that a panel of approved lawyers be established allowing a detainee a choice of approved lawyer from that approved panel

The Attorney General should not be permitted to decline the appointment of a person as an approved lawyer other than on the basis of an adverse or qualified security assessment appealable before the Security Appeals Tribunal. However, s.34 AA(2)(c)(ii) allows the Minister to consider "any other material that the Minister considers is relevant to the question whether to approve the practitioner".

The inclusion of this provision (effectively unreviewable because of national security evidentiary considerations and AAT and judicial reticence in national security matters) has the potential to undermine the integrity, appropriate expertise and independence of the system of a panel of approved lawyers, necessary to safeguard the interests of the detainee.

. Issuing authorities: 34A and 34AB

These provisions permit appointment by regulations of a class of persons to be issuing authorities for the purposes of issuing warrants ie it allows the appointment by regulation of non-judicial officers.

The intention behind these provisions appears to allow a replacement issuing authority in the event that the High Court finds that the use of judicial officers as issuing authorities as unconstitutional under the doctrine of incompatibility in *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

However, the provision is not restricted to such an eventuality. For example, the Attorney-General could be declared as a member of a class of persons eg “Cabinet Ministers” by regulations creating issuing authorities. The other intelligence gathering warrant powers under the Act are exercised by the Attorney General and are not judicial warrants.

The definition of “issuing authority” in 34A (a) should be amended to require a declaration of unconstitutionality of judicial office holders to act as issuing authorities, and a prohibition about members of the executive being appointed as issuing authorities.

. Prescribed authorities: 34B: Use of untenured AAT members

The bill persists with the use of untenured AAT appointees as prescribed authorities. Such appointees, if aspiring to reappointment, are vulnerable to informal institutional and other pressures, or the perception thereof, in exercising the range of functions and discretions once the warrant for interrogation has been issued.

It is no coincidence that the explosion in telecommunications interception warrants has occurred when the task of issuing the warrants has been assigned to AAT members.

All AAT members undertaking prescribed authority duties other than the issue of warrants should hold tenured positions to a fixed retiring age of 65 or 70 years under s.8 of the *Administrative Appeals Tribunal Act 1975* (Cth) and preferably be appointed at Deputy President level.

The Attorney General has said the bill will only be used as a measure of last resort. Accordingly, this proposal should only necessitate the making of a small number of new tenured appointments or the conversion to tenure of some existing appointments and ensuring sufficient geographical distribution of these AAT appointees throughout the Commonwealth.

This measure is intended to provide greater capacity to resist Executive and bureaucratic pressure in the exercise of functions and discretions, to lessen the seeking of preferment or reappointment to higher levels of seniority in the AAT, and to provide public reassurance of non-judicial independence.

I formed this conclusion after a confidential discussion on 1 May 2002 with a former Senior Member of the AAT (who was on a term appointment and not re-appointed) about the informal internal workings of the tribunal.

This measure would also ensure that in the event of a declaration of unconstitutionality by the High Court of the proposed *persona designata* involvement of judicial officers in issuing warrants, a higher level of independence would already be in existence for the likely substitution of AAT appointees as the issuing authority.

. Adopting acts in relation to a written statement of procedures to be followed in exercise of authority under warrants: 34C (3)(ba) and 34C (3A)

To ensure that an acceptable human rights standard is achieved, the Protocols should be enacted by way of a disallowable regulation and the bill should be amended to reflect this.

The present arrangement in 34C (3A) (d) of presentation of the statement to each House of the Parliament is inadequate.

On the adopting acts for the written statement of procedures, see also the observations under the heading “Humane treatment of persons specified in the warrant: 34 J”, below.

. Ability to contact approved lawyer: 34C (3B) and (3C)

The ability of the Minister to delay access to an approved lawyer for up to 48 hours has already been shown to be an unacceptable breach of international human rights standards.

Paragraph 7 of Schedule 8 to the *Terrorism Act 2000* (UK) confers a right upon a person detained to consult a solicitor as soon as is reasonably practicable, privately and at any time. Paragraph 8 of Schedule 8 to the *Terrorism Act 2000* (UK) permits authorisation of a delay to the paragraph 7 right where there are reasonable grounds for believing certain specified consequences will eventuate, but the right cannot be delayed for more than 48 hours.

However, the *Terrorism Act 2000* (UK) simply refers to a “solicitor”. The approved, security cleared legal adviser system under the Australian bill, and the offences created for unauthorised communications by a legal adviser under s.34 U (7), confirm that the delay of access to a lawyer for up to 48 hours is unnecessary, excessive and inappropriate.

Accordingly, there are no reasonable grounds to delay such contact with an approved lawyer under the Australian bill. It should also be recalled that the UK legislation refers to the provision of legal advice to persons reasonably suspected as being concerned in the commission, preparation or instigation of acts of terrorism. It does not permit detention of citizens not suspected of an offence.

The lack of entitlement to an approved lawyer in the bill during the first 48 hours effectively nullifies the right to seek judicial review before a federal court.

. Concept of “contact” with an approved lawyer when in custody or detention: no specificity of right to presence during interrogation: 34C (3B) and (3C) and 34U

The bill uses the ambivalent term “contact” with an approved lawyer. There is no specificity as to the right of continuous presence of the approved lawyer during interrogation by ASIO. Continuous presence is essential to ensure welfare of the detainee and is another reason why the detainee should be allowed a choice from a panel of approved lawyers.

The bill should be amended to confer a right to the presence of an approved lawyer at all times during interrogation by ASIO before the prescribed authority, rather than simply assuming that this right will be observed by implication from the legislation by a prescribed authority.

. Non-custodial warrant for questioning: 34D (2) (a): access to legal adviser and/or approved lawyer

This provision requires a specified person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant.

The bill should be amended so as to confer access to, provision of, and presence of, the person's own legal adviser and/or an approved lawyer during such non-custodial questioning before the prescribed authority

. Exercise of right to seek remedy before federal court relating to warrant or treatment of person in connection with the warrant: 34E (3)

Where access to an approved lawyer is withheld for up to 48 hours under 34C (3C), the right of the detainee to seek review and a remedy from a federal court relating to the warrant or to individual treatment (see 34E (1)(f)), when first appearing before the prescribed authority, and the right having to be advised by the prescribed authority at least once every 24 hours (see 34E (3)) becomes meaningless without that availability of legal representation to advise the detainee, contact the court, initiate proceedings and represent the detainee.

The prescribed authority should be required to advise the person **in the presence of, and with the opportunity to consult with, an approved lawyer** that they have the right to seek judicial review **by a Federal Court judge** at each 24 hours of detention and at every time a subsequent warrant is sought and **to be represented by an approved lawyer** in such an application for judicial review.

. Prohibition on contact and prevention from contact by detainee of anyone at any time whilst in custody or detention: 34F (8)

Under this provision, the whereabouts of a detainee may remain unknown to relatives, friends, employers and others, so that the detainee disappears from the community for a formal period of up to one week. There is no right for the detainee to notify such persons of his or her whereabouts.

Even under the *Terrorism Act 2000* (UK), a person detained on criminal reasonable suspicion grounds has the right to notify a friend, relative or other interested person of their whereabouts: Schedule 8, Paragraph 6. This right to notify may be suspended for specified reasons (such as alerting persons about to engage in a terrorist act) but only for a maximum of 48 hours: Schedule 8, Paragraph 8 and s.41 (3)

Again, it is important to keep in mind that under the Australian bill, the person detained is not reasonably suspected of a terrorism offence, yet is not accorded the right to notify a person of their whereabouts which is available under the UK legislation.

. Retention of evidential burdens: 34G

The requirement that the defendant bears an evidential burden in relation to 34G (4) that the person does not have the information and 34 G (7) that the person does not have possession or control of the record or thing should be deleted. Such an amendment will provide a further safeguard for the detainee.

. Presence of Inspector General of Intelligence and Security during interrogation: 34HA

The bill and the *Inspector General of Intelligence and Security Act 1986* should be amended to specifically state that the Inspector General has a right to be present at any interrogation conducted under the warrant powers.

This measure is necessary to clarify the right to attend as being based on definite grounds other than the present Inspector General's personal interpretation of s.34T of the bill.

Given that amendments to the *Intelligence Services Act* proposes that a review be conducted of the *ASIO Legislation Amendment (Terrorism) Act 2002* after three years of operation, the bill should be further amended to require:

- (a) in the first year of operation, for the Inspector General to attend a specified number of interviews conducted under the warrant powers
- (b) in the second and third years of operation, for the Inspector General to attend at least a nominated percentage eg one quarter or one third of all interviews.

This attendance will have a number of benefits, including providing an empirical basis for the Joint Parliamentary Committee review of the legislation after three years

. Humane treatment of persons specified in the warrant: 34J

The language of Clause 34 J (2) derives from Arts 7 and 10 of the *International Covenant on Civil and Political Rights* and more generally from the *Geneva Conventions*. A similar provision exists in the *Commonwealth Crimes Act*: see s.23Q

The bill should specify that the protocols developed through the consultative process should be consistent with, and developed in conformity with, Article 7 and 10 of the *International Covenant of Civil and Political Rights*, the prohibition against cruel, inhuman and degrading treatment or punishment and the interpretative General Comments of the UN Human Rights Committee on Article 7 (currently General Comment 20) and Article 10 (currently General Comment 21).

The Commonwealth Human Rights Commissioner, appointed under the *Human Rights and Equal Opportunity Act 1986* (Cth), should play a central role in drafting these protocols to ensure independent expertise necessary to meet Australia's international law obligations.

The formulation of a written statement of procedures to be followed in the exercise of authority under warrants issued under section 34D through "adopting acts" (34 C 3A) specifically omits the consultation of any specialist international human rights law expertise as part of the adopting acts,

which is absolutely essential to ensure compliance with the ICCPR articles. The bill should be accordingly amended.

This measure is designed to ensure compliance with the ICCPR and to avert the need for individual detainees to make complaints under the Optional Protocol to the UN Human Rights Committee in Geneva for alleged breaches of the ICCPR in the administration of the legislation.

. Rules for persons who are at least 14 but under 18: “likely that the person will commit, is committing or has committed a terrorism offence”: 34NA (4)(a)

The inclusion of this section highlights the conceptual confusion underpinning the bill: it openly combines the disparate and irreconcilable objectives of intelligence gathering, preventative detention and criminal investigation.

This section is a transparent indication why the bill should be scrapped and new anti-terrorism investigatory and intelligence gathering legislation drafted on a conventional criminal law, human rights compliant model, drawing upon and adapting to Australian circumstances the Canadian and United Kingdom provisions for investigating persons suspected of terrorism offences and persons not suspected of terrorism offences from whom intelligence is sought.

. Offences of contravening safeguards: 34NB requirement of knowledge, but not recklessness or negligence

The requirement of knowledge of the contravention sets too high a standard of culpability in offences against persons detained who are not suspected of any criminal offence.

Furthermore, the requirement of knowledge will encourage a laxity in implementing systems for the observance of procedural safeguards, including compliance with the written statement of procedures to be followed in the exercise of authority under s.34 D warrants. It will make investigation and prosecution of alleged offences exceedingly difficult and deterrence of offences improbable.

The standard of recklessness used for offences in the *Security Legislation Amendment (Terrorism) Act 2002* should be adopted, namely alternative offences with intention (in this case knowledge) and recklessness. The standard of negligence should also be applied in the alternative to these offences.

All of these concepts are defined in Division 5: Fault elements in the *Criminal Code Act 1995* (Cth)

Graded penalties and the opportunity for alternative verdicts for knowledge, recklessness and negligence should be included in the bill.

. Offences of contravening safeguards: identity of alleged offenders: 34NB

The application of penalty clauses will only be effective if ordinary police investigation and prosecution before a court can actually be carried out. In this respect the ability to identify the allegedly offending ASIO officer at each stage of the investigatory, prosecutorial and curial processes is critical and a discretion allowing the withholding of such an identity will frustrate those processes.

The operation of a penalty clause needs to be properly reviewed alongside the existing prohibitions against the publication of the identity of an officer of the Organisation contained in s.92 of the *ASIO Act 1979* (Cth), which carries a penalty of imprisonment for one year.

S.92 needs to be amended to ensure that investigatory, prosecutorial and curial processes work in relation to the 34 NB offences.

What is the current procedure for the disclosure of ASIO personnel identities where there are allegations of impropriety or illegality? Is that procedure adequate to make the penalty clauses actually enforceable? Does the bill need to be amended to facilitate investigations and prosecutions and give practical substance to the offences arising when safeguards are contravened?

The circumstances of *A v Hayden* (1984) 156 CLR 532 (the Sheraton raid) and the report of Justice Hope (*Royal Commission on Australia's Security and Intelligence Agencies Report on the Sheraton Hotel Incident* Canberra, AGPS 1984) are instructive in this respect.

. Status of prescribed authority and immunity in performance of duties: 34SA

The legislation should do more to ensure compliance with the s. 34J requirement that the detainee must be treated with humanity and with respect to human dignity, and not be subject to cruel, inhuman or degrading treatment or punishment.

A personal basis of liability should be established for the prescribed authority should be established for exercising discretions and functions in conformity with these standards. Sections 34 J, 34 NB (4) and 34 SA should be amended to render a prescribed authority liable to the s.34 NB (4) offence of contravening this relevant safeguard and to remove the relevant immunity for this aspect in relation to performance of functions under the warrant.

This is important in general compliance terms, but more particularly given that the bill contemplates incommunicado detention for up to seven days.

. Involvement of lawyers: monitoring of contact: 34U (2)

Unlike the UK *Terrorism Act 2000*, which refers to a “solicitor”, the Australian bill adopts a scheme of security cleared approved lawyers which removes the justification for contact with the approved lawyer to be monitored by a person exercising authority under the warrant.

Paragraph 7, Schedule 8 of the *Terrorism Act 2000* (UK) commences with a RIGHT that a detained person shall be entitled to consult a solicitor as soon as is reasonably practicable, *PRIVATELY*, and at any time

Paragraph 9, Schedule 8 of the *Terrorism Act 2000* (UK) CREATES AN EXCEPTION TO THE RIGHT of private consultation with the solicitor, by providing for a direction that in certain circumstances, the right of a detained person to consult with a solicitor shall only be within the sight and hearing of a qualified officer. Such circumstances include *inter alia* alerting of a person making it more difficult to prevent an act of terrorism, or apprehension, prosecution or conviction for a terrorism offence, or interference with the gathering of information about the commission, preparation and instigation of acts of terrorism.

Such situations should not arise under the Australian approved lawyer arrangements and hence the justification for monitoring lawyer-detainee communications does not exist. The bill should be accordingly amended allow for approved lawyer-client private communications.

. Involvement of lawyers: prohibitions on intervening in questioning, addressing the prescribed authority: 34U (4)

Under 34 U (4), the legal adviser may not intervene in questioning of the subject or address the prescribed authority.

The document “Proposed Government Amendments” under Recommendation 6 states “The lawyer may not intervene in the questioning or address the prescribed authority except to request clarification of an ambiguous question.” It then argues “ This is consistent with practice in relation to compulsory examinations under the taxation and ASIC legislation, and the Trade Practices Act.”

This statement appears at odds with the ASIC legislation and is potentially misleading.

Under Division 2 of the *Australian Securities and Investment Commission Act 2001* (Cth), a notice requiring appearance for examination may be served on a person when certain conditions are satisfied. The relevant section of the *ASIC* legislation is substantially narrower than the present bill. It reads:

23 Examinee’s lawyer may attend

- (1) The examinee’s lawyer may be present at the examination and may, at such times during it as the inspector determines:
 - (a) address the inspector; and
 - (b) examine the examinee;
 about matters about which the inspector has examined the examinee.
- (2) If, in the inspector’s opinion, a person is trying to obstruct the examination by exercising rights under subsection (1), the inspector may require the person to stop addressing the inspector, or examining the examinee, as the case requires.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

- (3) An offence under subsection 63(4) relating to subsection (2) of this section is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

Clearly, this legislation permits the lawyer to address the inspector about a broad range of matters relating to the questioning of the person and enables the lawyer to put questions to the person. The controls on such questioning are merely the timing of the questions asked of the inspector and the examinee, and a prohibition against obstructing the examination.

34 U (4) of the bill should be amended to allow a legal adviser to ask a similar range of questions, subject to issues of timing and a prohibition against disruptive intervention deliberately intended to frustrate the intelligence gathering process.

CONCLUSION

The *ASIO Legislation Amendment (Terrorism) Bill 2002* (Cth) should be wholly discarded and new legislation drafted to ensure anti-terrorism measures are constitutional and adhere to the values, practices and rights of a pluralist democracy, the very things undermined by terrorism.

The new legislation should apply the human rights standards in terrorism legislation of comparable democracies such as Canada and the United Kingdom and develop an alternative, non-custodial mechanism applicable to persons not suspected of any terrorism offence who may have information relevant to the prevention of a terrorist attack.

I would be pleased to provide further information in support of this submission and to attend a hearing of the Committee if requested.

Yours faithfully,

(Dr) Greg Carne

APPENDICES:

- 1. United Nations Human Rights Committee *International Covenant of Civil and Political Rights* General Comment 20 on Art 7, General Comment 21 on Art 10, General Comment 8 on Art 9**
- 2. Relevant sections of *Anti-Terrorism Act 2001* (Canada)**
- 3. Relevant sections of *Terrorism Act 2000* (UK)**
- 4. “An unnecessary loss of rights” *Canberra Times* 17 June 2002, 11.**